

# FATE CONTROL AND HUMAN RIGHTS: THE POLICIES AND PRACTICES OF LOCAL GOVERNANCE IN AMERICA'S ARCTIC

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## ABSTRACT

*The loss of territoriality over lands conveyed under the Alaska Native Claims Settlement Act had adverse impacts for Alaskan tribal governance. Despite policy frameworks that emphasize the value of local governance at an international, regional, and statewide level, Alaskan tribes face unique obstacles to exercising their authority, with consequences for both human development and human rights. This Article examines how territoriality was lost and analyzes the four major effects of this loss on tribal governance. It then describes two distinct but complimentary strategies to rebuilding tribal governance authority that rely on both territorial and non-territorial authority.*

## INTRODUCTION

Land sovereignty is vital to the ability of Alaskan tribal governments to exercise local control. This Article examines how Alaskan tribes lost authority over traditional lands—their territorial reach—and the impacts of this loss on their ability to protect community wellbeing. This Article concludes that, despite the creative ways governments overcome the loss of territoriality, re-establishing land sovereignty is critical to local self-governance.

Governments exercise authority over place and people. While these

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two aspects of sovereignty—place and people—are often thought of as inextricably bound together,<sup>1</sup> the two do not always co-exist. The Alaska Native Claims Settlement Act of 1971 (ANCSA)<sup>2</sup> broke apart tribal sovereign authority into clearly delineated components: land and membership.<sup>3</sup> Defined as “sovereigns without territorial reach,” Alaskan tribes experience unique challenges to their exercise of local governance.<sup>4</sup> Part I of this paper frames the issue regionally, describing the evolution of “fate control” as a principle of Arctic human development supporting strong local governance. Part II focuses on Alaska specifically, identifying how Alaska’s principles of local governance differ from its practice. Part III examines the loss of territorial governance and its impact on tribal governments’ capacity to address issues of community wellbeing. Part IV describes two of the many ways Alaskan tribes are seeking increased governance authority: designating more land as Indian Country and using science and traditional knowledge. In particular, Part IV highlights the work of the Yukon River Inter-Tribal Watershed Council—an international treaty-based organization of Alaskan tribes and Canadian First Nations intent on weaving together seemingly disparate strands of science, law, and policy into a single path towards self-determination.

Finally, this Article concludes that the value of local control and governance is recognized in principle but not in practice throughout all levels of governance. To live up to these ideals, Alaska must create and adopt policies that better support local government.

## I. FATE CONTROL AS A PRINCIPLE OF HUMAN DEVELOPMENT IN THE ARCTIC

The concept of “fate control” is viewed as one of the key determinants of wellbeing in Arctic communities.<sup>5</sup> The Arctic Social

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1. See Frederico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT’L L.J. 155, 160 (2006) (discussing sovereignty as power over a territory and a community of people).

2. 43 U.S.C. §§ 1601–29h (2012).

3. *Id.*

4. *Alaska ex rel. Yukon Flats Sch. Dist. v. Venetie Tribal Gov’t*, 101 F.3d 1286, 1303 (9th Cir. 1996).

5. NORDIC COUNCIL OF MINISTERS, ARCTIC SOCIAL INDICATORS 16 (Joan N. Larson et al. eds., 2010) [hereinafter ASI I]. Fate control is similar to the human right of self-determination found in a variety of international legal instruments. Cf. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 4, U.N. GAOR, 61st Sess., Supp. No. 53, U.N. Doc. A/RES/61/295, at 4 (Sept. 13, 2007); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (1966), 999 U.N.T.S. 171, entered into force, Mar. 23, 1976; U.N. International Covenant on

Indicators report of 2010 defines “fate control” as the ability of communities and individuals to “control their own destiny, whether political, economic or along other axes.”<sup>6</sup> “Those [who] feel[] empowered to control their fate,” the report justifies, “are more likely to take actions needed to better their situation.”<sup>7</sup> Since 2004, an emphasis on fate control as part of a larger human development framework has allowed northern governments to assess and support the capacity of their communities to respond to increased global political and economic attention to the region.

The focus on human development as a policy framework in the United States dates back to the 1990s.<sup>8</sup> Human development proponents argue that the goal of development projects should be to “enlarge people’s choices”<sup>9</sup> by addressing the lack of education, poor health care, inequalities in economic, social, and political rights, and other factors that hinder human progress.<sup>10</sup> Instead of focusing on the expansion of “only one choice—income,” human development proponents suggest enlarging “all human choices—whether economic, social, cultural, or political.”<sup>11</sup> Measuring human progress, then, becomes a study of literacy, longevity, and GDP per capita rates together, as opposed to income alone.<sup>12</sup> The human development paradigm has received widespread support.<sup>13</sup> In particular, the United Nations published the first annual Human Development Report in 1990 and has relied on the human development paradigm ever since.<sup>14</sup>

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Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), at 49; 993 U.N.T.S. 3, *entered into force*, Jan. 3, 1976. One of the differences between the two is that self-determination is a human right (and therefore enforceable) whereas “fate control” is a way to measure progress or well-being within a human development rubric (and therefore aspirational).

6. ASII, *supra* note 5, at 16–17.

7. *Id.*

8. Mahbub ul Haq, *The Human Development Paradigm*, in READINGS IN HUMAN DEVELOPMENT 17, 22 (Sakiko Fukuda-Parr & A.K. Shiva Kumar eds., 2003).

9. *Id.* at 17.

10. See Amartya Sen, *Foreword* to READINGS IN HUMAN DEVELOPMENT, *supra* note 8, at vii, vii (discussing various hindrances that frustrate human potential).

11. ul Haq, *supra* note 8, at 17.

12. ul Haq, *The Birth of the Human Development Index*, in READINGS IN HUMAN DEVELOPMENT, *supra* note 8, at 103, 103.

13. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, U.N. HUMAN DEVELOPMENT REPORT 1990: CONCEPTS AND MEASURES OF HUMAN DEVELOPMENT 1 (1990) (publishing the first annual Human Development Report in 1990).

14. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, U.N. HUMAN DEVELOPMENT REPORT 2014: SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE 1 (2014) (publishing the most recent annual Human Development Report in 2014).

The concept of human development resonates strongly throughout the Arctic. The concern for “the richness of human life, rather than the richness of the economies in which human beings live”<sup>15</sup> is profoundly felt by indigenous communities.<sup>16</sup> Human development frameworks are particularly relevant as most communities in the Arctic, though located in fairly wealthy nation-states, remain economically troubled.<sup>17</sup>

Consequently, in 2002 the Arctic Council—an international governmental organization comprised of eight member nation-states and six “permanent participants,”<sup>18</sup>—called for the drafting of a Human Development Report (AHDR) for the Arctic.<sup>19</sup> Released in 2004, the AHDR acknowledged that even within a human development framework, the unique attributes of life in the Arctic and the historic context of Arctic indigenous peoples call for special attention.<sup>20</sup> The AHDR suggested three factors to consider with regards to human development in the Arctic: (1) the ability of communities to control their own fate, (2) the ability of communities to promote their cultural viability, and (3) the ability of communities to continue to rely on the natural environment to sustain themselves.<sup>21</sup>

In terms of Arctic governance, the AHDR identified the importance of property rights and the allocation of power to local governments as

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15. *About Human Development*, UNITED NATIONS DEVELOPMENT PROGRAMME, <http://hdr.undp.org/en/humandev> (last visited Sept. 20, 2014) (quoting Amartya Sen).

16. See Arthur Manuel & Nicole Schabus, *Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law*, 8 CHAP. L. REV. 229, 230–31 (2005) (comparing the rank of indigenous peoples in Canada on the Human Development Index to that of the rest of Canada).

17. See *id.* (discussing Canada’s high ranking on the Human Development Index and the much lower levels of development in indigenous communities).

18. “Permanent Participants” are organizations representing Arctic Indigenous peoples and provide for their participation in activities of the Arctic Council. These participants include the Aleut International Association, the Arctic Athabaskan Council, the Gwich’in Council International, the Inuit Circumpolar Conference, the Russian Association of Indigenous Peoples of the North, and the Saami Council. *Permanent Participants*, ARCTIC-COUNCIL, <http://www.arctic-council.org/index.php/en/about-us/permanent-participants> (last visited Oct. 2, 2014).

19. ASI I, *supra* note 5, at 7.

20. See ORAN R. YOUNG & NIELS EINARSSON, ARCTIC HUMAN DEVELOPMENT REPORT 16–17 (Stefansson Arctic Inst. ed., 2004) (discussing unique aspects of life in the Arctic and the limitations of the Human Development Index).

21. See ASI I, *supra* note 5, at 12 (discussing the Arctic Human Development Report’s identification of these three factors of well-being as important in defining well-being in the Arctic); JACK KRUSE ET AL., SLICA RESULTS 123 (2007) (concluding that well-being in Arctic communities is closely related to job opportunities, locally available fish and game, and a sense of local control).

two critical components necessary to ensure the sustainability of culture and environment in the Arctic.<sup>22</sup> The AHDR recommended “systematic studies and analysis of the full range of property-rights systems as they are applied in the Arctic . . . [.] look[ing] critically both at the privatization approaches . . . in North America and of alternative systems.”<sup>23</sup> It found that the lack of local governance directly affects human health in the Arctic.<sup>24</sup> In areas with effective local self-government, for example, mental health has improved and suicide rates have fallen.<sup>25</sup>

Since the AHDR in 2004, there have been efforts to operationalize its recommendations. The Arctic Social Indicators (ASI) project follows up on the work of the AHDR and seeks to devise indicators to monitor human development in the region.<sup>26</sup> The ASI project led to the issuance of two reports: ASI I in 2010, which identified a series of measurable indicators to chart progress in wellbeing and human development,<sup>27</sup> and ASI II in 2014, which analyzed a series of case studies from different parts of the Arctic.<sup>28</sup> As of this writing, a second report from the United Nations on Arctic Human Development is expected in the second half of 2014.<sup>29</sup>

With fate control ensconced as a marker of progress for northern communities, such communities have focused on how best to ensure their ability to govern. This question is especially complicated in Alaska, where the ability of small communities to govern is hampered by the loss of territorial governance.<sup>30</sup>

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22. RICHARD A. CAULFIELD, ARCTIC HUMAN DEVELOPMENT REPORT 121 (Stefansson Arctic Inst. ed., 2004).

23. *Id.* at 135.

24. CARL M. HILD & VIGDIS STORDAHL, ARCTIC HUMAN DEVELOPMENT REPORT 159 (Stefansson Arctic Inst. ed., 2004).

25. *Id.*

26. ASI I, *supra* note 5, at 12.

27. *Id.*

28. NORDIC COUNCIL OF MINISTERS, ARCTIC SOCIAL INDICATORS II 53–93 (Joan N. Larson et al. eds., 2014) [hereinafter ASI II].

29. Arctic Human Development Report, Stefansson Arctic Institute, <http://www.svs.is/en/ahdr-ii-en> (last visited Oct. 2, 2014).

30. See Geoffrey D. Strommer & Stephen D. Osborne, “Indian Country” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 1 (2005) (discussing the challenges Alaska Natives face with regards to tribal sovereignty). This remains true even though principles of local government are enshrined in the Alaska Constitution. See ALASKA CONST. art. X, § 1 (“The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.”).

## II. ALASKA AND “LOCAL SELF-GOVERNMENT”

### A. Principles of Local Control

Three different sovereigns exist and exercise authority in Alaska: the federal government, the state government, and tribal governments. As described below, the federal government exercises authority over approximately two-thirds of the state’s lands and resources; the state government has jurisdiction over approximately one-quarter of the lands and resources; and tribal governments lack sovereignty over either the lands or resources that have been transferred under the Alaska Native Claims Settlement Act. This distribution creates a disparity of control among the three sovereign entities, disrupting tribal communities’ efforts of local governance.

Three pieces of federal legislation carved Alaska into three different forms of common ownership. First, the Alaska Statehood Act of 1959 ceded the title to twenty-five percent of lands within the Alaskan territory to the new state.<sup>31</sup> The Alaska Constitution requires that these lands be managed for the equal benefit of all Alaskans, giving rise to the idea that Alaska is an “owner” state.<sup>32</sup> Second, the Alaska Native Claims Settlement Act of 1971 (ANCSA) ceded title of almost twelve percent of Alaska’s lands to the Alaska Native Corporations (ANCs) created under the Act and chartered under state law.<sup>33</sup> Third, though many of the federal conservation units founded within Alaska were created prior to its statehood, the Alaska National Lands Conservation Act of 1980 (ANLCA) cemented land statuses within the state.<sup>34</sup> Under ANLCA and other laws, the federal government owns and manages approximately sixty-one percent of the land within the state’s borders, mostly in some form of conservation unit.<sup>35</sup> Taken together, ninety-nine percent of Alaska’s lands are owned either by the federal government, the state government, or ANC shareholders.

On the state side, Alaska’s constitution emphasizes the need to seat governments close to the people.<sup>36</sup> Structuring the state’s political

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31. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

32. See ALASKA CONST. art. VIII, § 1 (“It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”).

33. 43 U.S.C. §§ 1601–29h (2012).

34. 16 U.S.C. §§ 3101–233 (2012).

35. *Resource Review: Who Owns Alaska?*, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC. 2, <http://www.akrdc.org/newsletters/2009/whooownsalaska.pdf> (last visited Oct. 2, 2014).

36. See ALASKA CONST. art. X, § 1 (stating that the state should have a maximum of local self-government with a minimum of local government units).

organization to “provide for maximum local self-government with a minimum of local government units,” the constitution attempts to balance the need for local control with the goal of minimizing layers of bureaucracies.<sup>37</sup> The state’s founders envisioned a system of nested local governments to ensure local needs were met and sufficient resources would be available to meet those needs.<sup>38</sup> When Alaskans sought statehood in 1958, they did so in large part to get away from the control of corporate interests and the federal government.<sup>39</sup> The constitution’s call for “maximum local self-government and minimum local governmental units” attempts to ensure a system of government responsive to local needs.<sup>40</sup> As a result, Alaska adopted a system of “home rule” local governments.<sup>41</sup> “Home rule” was also to be the means for promoting local government adaptation in a state with great variations in geographic, economic, social, and political conditions.<sup>42</sup>

Alaska state law creates two general types of municipal governments: cities and boroughs.<sup>43</sup> Both have the power to tax and regulate, although the scope of each authority differs according to the specific classification of the governmental organization.<sup>44</sup> The sixteen organized boroughs cover roughly forty-three percent of Alaska’s geography, with the remaining fifty-seven percent comprised of a single, unorganized borough as required under state law.<sup>45</sup> The Alaska state legislature serves as the governing body for the unorganized borough.<sup>46</sup> Within the unorganized borough, there is an additional governance structure—the regional educational attendance area (REAA).<sup>47</sup> REAAs are service areas created to provide public education throughout the unorganized borough (except within some types of cities).<sup>48</sup>

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37. See GERALD McBEATH & THOMAS MOREHOUSE, *ALASKA POLITICS AND GOVERNMENT* 256–59 (Nebraska: University of Nebraska Press, 1994) (discussing the goals of the framers of the Alaska Constitution for local government).

38. *Id.*

39. DAVID GETCHES, *North Slope Borough, Oil, and the Future of Local Government in Alaska*, 3 UCLA ALASKA L. REV. 55, 56 (1973–74).

40. ALASKA CONST. art. X, § 1, cl. 1.

41. *Local Government in Alaska*, ALASKA DEP’T OF CMTY. AND ECON. DEV. § 2 (March 2004) <http://commerce.alaska.gov/dnn/Portals/4/pub/LocalGovernmentinAlaska032004.pdf>.

42. McBEATH & MOREHOUSE, *supra* note 37, at 3.

43. ALASKA STAT. §§ 29.04.010–29.04.060 (2012).

44. *Id.*

45. *Unorganized Areas of Alaska that Meet Borough Incorporation Standards*, ALASKA LOCAL BOUNDARY COMMISSION TO THE ALASKA LEGISLATURE 29 (Feb. 2003), <http://www.commerce.state.ak.us/dcra/lbc/pubs/Ch1.pdf>.

46. ALASKA CONST. art. X, § 6, cl. 1; ALASKA STAT. § 29.03.010.

47. ALASKA STAT. § 14.08.031.

48. *Id.*

Likewise, the Alaska Constitution embodies the ideal of an “owner state,” a term employed by former Alaska Governor Walter Hickel to express the idea that Alaska’s lands and resources should be used to the benefit of all Alaskans.<sup>49</sup> “[The] constitution recognized that the state would sometimes have to choose who would get to use scarce resources,” Hickel said, “but it also prohibited special privileges or exclusive rights to what is commonly owned.”<sup>50</sup> The constitution established systems to govern resource management, ensure local control over the resources upon which local communities directly depend, and share authority for the health of Alaska’s common resources between multiple layers of government.<sup>51</sup> Collective control over resources is further embodied in the Declaration of Rights in the Alaska Constitution: “all persons have corresponding obligations to the people and to the State.”<sup>52</sup> In short, state policies reflect and reinforce Alaska’s commitment to local governance.

## B. Practices of Local Governance

Alaska’s policies of local self-government, however, stand in stark contrast to the lack of authority given to tribal governments. Professors Morehouse and McBeath have noted that, while the urban system of governance is relatively simple, the corresponding rural system is very complex.<sup>53</sup> This “complex nonsystem”<sup>54</sup> of governance in the rural areas of Alaska creates tremendous obstacles for tribal governments when measured against similarly situated local governments in urban Alaska. The impacts of this disparity are magnified by the unwillingness of the State of Alaska to work with tribal governments. On multiple occasions, for example, the state has litigated against Alaska Native tribes to prevent their exercise of certain aspects of local self-government.<sup>55</sup>

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49. Interview by Charles Wilkinson & Patty Limerick with Walter J. Hickel, Former Secretary of the Interior, in Boulder, Colo. (Oct. 15, 2003), at 12, *available at* <http://centerwest.org/wp-content/uploads/2011/01/hickel.pdf>.

50. WALTER J. HICKEL, *CRISIS IN THE COMMONS: THE ALASKA SOLUTION* 78 (2002).

51. *See* ALASKA CONST. art. X (stating how resources will be governed).

52. ALASKA. CONST. art. I, § 1, cl. 3.

53. McBEATH & MOREHOUSE, *supra* note 37, at 282.

54. DAVID CASE & DAVID VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 325 (3d ed., 2012).

55. *See, e.g.,* *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014) (holding that tribal sovereignty extended to member children, against state objections in the trial court); *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520 (1998) (holding that ANCSA extinguished Indian country); *John v. Baker*, 982 P.2d 738 (Alaska 1999) (holding that tribal court and state court exercised concurrent jurisdiction over child custody disputes between tribal members).



Exactly how far the scope of tribal sovereignty in Alaska extended remained unsettled until almost thirty years after the passage of the ANCSA in 1971.<sup>56</sup> Unlike other land settlements with aboriginal tribes,<sup>57</sup> ANCSA did not reserve any governance rights in traditional lands to the tribes who had existed on these lands for millennia.<sup>58</sup> It was not until 1998, when the United States Supreme Court faced the issue of whether tribes could exercise their governance authority to regulate and tax ANCSA lands, that the contours of tribal jurisdiction became more clearly known. In *Alaska v. Village of Venetie Tribal Government*,<sup>59</sup> the Court determined that because ANCSA conveyed lands to “state-chartered and state-regulated private business corporations,” these lands were not “Indian Country” capable of supporting tribal governance.<sup>60</sup> The Court held that ANCSA severed tribal territorial jurisdiction over ANCSA lands, leaving “[tribes] as sovereign entities for some purposes, but as sovereigns without territorial reach.”<sup>61</sup> The result is that ANCSA lands are beyond the reach of tribal control, and remain within the exclusive purview of the state to regulate and tax.<sup>62</sup>

The Court held that ANCSA preempted any claim to tribal governance authority over lands conveyed under the Act.<sup>63</sup> Alaska tribes no longer have the right to regulate, tax, or otherwise engage in management of fish and game resources on any lands conveyed under ANCSA. Instead, the authority to govern and manage these lands lies with the state. Without this authority, the ties between the tribes and the lands conveyed under ANCSA were severed.

In *John v. Baker*,<sup>64</sup> the Alaska supreme court found that under *Venetie* the “[t]he key inquiry . . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance.”<sup>65</sup> In holding that tribes “have power to make their own substantive law in internal matters,” the court stated that tribal courts may also have jurisdiction to “resolve civil disputes involving non-members, including non-Indians” when the civil actions involve matters essential to self-governance and are “vital to the

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56. 43 U.S.C. §§ 1601–29h (2012).

57. See John Briscoe, *The Aboriginal Land Title of the Native People of Guam*, 26 U. HAW. L. REV. 1, 2 (2003) (“It has long been settled that the native peoples of the contiguous 48 states enjoy aboriginal title.”).

58. CASE & VOLUCK, *supra* note 54, at 390.

59. 522 U.S. 520 (1998).

60. *Id.* at 534.

61. *Id.* at 526.

62. *Id.* at 530–31.

63. *Id.*

64. 982 P.2d 738 (Alaska 1999).

65. *Id.* at 756.

maintenance of tribal integrity and self-determination.”<sup>66</sup> That decision notwithstanding, the state government continues to fight the “228 landless Alaska tribes” whenever these tribes attempt to assert jurisdiction over matters involving domestic relations.<sup>67</sup>

### III. THE IMPACT OF *VENETIE* AND THE LOSS OF TERRITORIAL GOVERNANCE

In *Alaska v. Native Village of Venetie Tribal Government*,<sup>68</sup> the Supreme Court held that lands conveyed under ANCSA are outside the definition of “Indian Country” and cannot be the basis for sustaining territorial sovereignty.<sup>69</sup> This applies even when a tribal government owns the lands—as was the case in *Venetie*, where the village corporation transferred lands to the tribal government.<sup>70</sup> As a result of losing territoriality, Alaskan tribes lack critical governance tools to address persistent social problems such as poverty, unemployment, and continued social exclusion. The loss of territoriality is unique to Alaskan tribes and stands in stark contrast to the range of governance authorities enjoyed by the other local governments<sup>71</sup> and the reservation-based Indian tribes throughout the lower 48 states.<sup>72</sup>

This Part describes four specific consequences of the loss of

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66. *Id.*

67. See *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014) (considering the state’s objection to tribal sovereignty in a child custody case in which the father was not a member of the tribe); see also Brief for Appellant at 10–14, *Alaska v. Cent. Council of Tlingit Haida Tribes* (Alaska 2013) (No. S-14935), available at <https://turtletalk.files.wordpress.com/2014/07/state-brief.pdf> (arguing that the tribes’ lack of Indian Country means tribes cannot assert jurisdiction).

68. 522 U.S. 520 (1998).

69. As described *infra* Part IV.A, this situation has been exacerbated by a federal regulation that prohibits Alaskan tribes from seeking to put land back into trust status that would have had the effect of re-instituting Indian Country to the extent necessary to sustain tribal governance. Very recently, the U.S. government has sought to reverse this policy, as it applies only to Alaska Native tribes, and to bring these communities within the more broadly stated federal Indian policy of putting land into trust status as a way of supporting self-determination.

70. *Venetie*, 522 U.S. at 532.

71. See Mona Serageldin et. al., *Local Government Actions to Reduce Poverty and Achieve the Millennium Development Goals*, 2 GLOBAL URB. DEV. MAG. 1 (2006) (describing the various tools available to local governments to reduce poverty), available at <http://www.globalurban.org/GUDMag06Vol2Iss1/Serageldin,%20Sollosi,%20&%20Valenzuela%20PDF.pdf>

72. See LIBBY RODERICK, ALASKA NATIVE CULTURES AND ISSUES: REPONSES TO FREQUENTLY ASKED QUESTIONS 64 (2010) (noting that, with the exception of the Metlakatla reservation, Alaska Natives are unable to open casinos because they do not own land designated as “Indian Country”).

territoriality for Alaskan tribes. First, tribes cannot manage subsistence resources. Second, tribes lack the authority to regulate environmental quality to the same degree available to other tribes. Third, tribes lack the ability to tax and regulate activities that impact climate change. Finally, tribes do not have the legal authority to regulate public safety and therefore lack the capacity to protect their members.

#### A. Management of Subsistence Resources

*"For Alaska Natives, subsistence lies at the heart of culture, the truths that give meaning to human life of every kind. Subsistence enables the Native peoples to feel at one with their ancestors, at home in the present, confident of the future."*<sup>73</sup>

Subsistence lies at the heart of Alaska Native culture.<sup>74</sup> It is much more than just a way of putting food on the table. Although ANCSA settled aboriginal land claims, it did not resolve the pressing issue of protecting subsistence rights for Alaska Natives. Typically, rights to traditional subsistence practices are legally protected in one of three ways: reservations, off-reservation treaty rights, or other federal preemptive legislation.<sup>75</sup> ANCSA eliminated all reservations in Alaska (except for Metlakatla), precluding that option.<sup>76</sup> Similarly, the lack of off-reservation treaty rights to subsistence, coupled with the State of Alaska's rights to manage fish and game on both its and ANCSA's land, foreclosed this path as an opportunity to protect this cultural right.<sup>77</sup> The only option remaining to protect subsistence was through new, non-ANCSA, federal legislation.

Although the Alaska National Interest Lands Conservation Act of 1980 (ANILCA)<sup>78</sup> provided for a subsistence preference in hunting and fishing,<sup>79</sup> the fact that this issue is still an area rife with conflict underscores the fact that the current subsistence regulatory regime is far from satisfactory. Neither ANCSA nor ANILCA provided any opportunities for tribes to manage subsistence resources,<sup>80</sup> and dissatisfaction remains with the extent of protections for subsistence

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73. THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 55 (1985).

74. *Id.*

75. CASE & VOLUCK, *supra* note 54, at 268.

76. *Id.* at 270.

77. *Id.*

78. 16 U.S.C. §§ 3101–3233 (2012).

79. *Id.* § 3114.

80. CASE & VOLUCK, *supra* note 54, at 310.

harvest that the current regime provides.

This Subpart provides a brief discussion of the regulatory framework established under ANILCA and current efforts to reformat that framework to integrate tribal participation in management. It then examines the U.S. Marine Mammal Protection Act of 1972 (MMPA)<sup>81</sup> as an alternative approach to protecting subsistence. While ANILCA provides for participation by Alaska Natives as stakeholders, MMPA affords greater opportunities for tribes to engage in resource management as rights holders.

1. *The Alaska National Interest Lands Conservation Act: Stakeholders, Not Rights-holders, in Subsistence Management*

ANILCA set aside 104 million acres of land in Alaska (out of a total 375 million acres statewide) as federal parks, refuges, forests and conservation areas.<sup>82</sup> Unlike conservation units in the continental United States, ANILCA allows subsistence hunting and fishing within these federal conservation units, and recognizes it as a priority consumptive use.<sup>83</sup> Title VIII of the Act establishes that the “purpose . . . is to provide the opportunity for rural residents engaged in a subsistence way of life to do so.”<sup>84</sup> The statute specifies that in times of a resource shortage, subsistence uses are given priority in allocation.<sup>85</sup> Importantly, the Act designates “local” residents as the object of the statutory preference rather than Alaska Natives.<sup>86</sup> Rural residents who can demonstrate a history of dependence on wild resources qualify as “subsistence” users for purposes of this management regime.<sup>87</sup>

ANILCA likewise created a regional and local advisory system that provided a means for subsistence users to participate in natural resource decision-making.<sup>88</sup> Section 809 specifically provides for the Secretary of Interior to enter into cooperative agreements “or otherwise cooperate with other federal agencies, the State, Native corporations, other appropriate persons and organizations and . . . other nations to effectuate the purposes and policies of this title.”<sup>89</sup> Notably, this provision does not specify tribes among the list of potential governance

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81. 16 U.S.C. §§ 1361–1432h (2012).

82. ALLEN E. SMITH ET AL., ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT CITIZEN’S GUIDE 10 (2001).

83. *Id.* at 29.

84. *Id.* at 33.

85. 16 U.S.C. § 3114 (2012).

86. *Id.*

87. *Id.*

88. SMITH ET AL., *supra* note 82, at 33–34.

89. *Id.*

partners. Although ANILCA has created opportunities for rural Alaskans to participate in subsistence management decisions, the statute does not specify or recognize the unique tribal and traditional relationship between Alaska Natives and the resources managed under this statutory scheme.

The State of Alaska set up a similar scheme providing for individual involvement in resource management.<sup>90</sup> In both the federal and state systems, individual local rural residents sit on these boards, not representatives of local governments or tribes.<sup>91</sup> The failure of these systems to protect subsistence traditions led to a movement within the Alaska Native community to integrate tribes as partners in subsistence management. In a white paper prepared by the Alaska Federation of Natives (AFN) for the 2012 presidential and congressional transitions, AFN stated that “the legal framework governing subsistence in Alaska significantly hampers the ability of Alaska Natives to access their traditional foods.”<sup>92</sup> Blaming both the federal and state governments for failing to protect subsistence for Alaska Natives, AFN is currently pushing for new legislation to ensure a “Native” or “tribal” subsistence preference throughout Alaska.<sup>93</sup>

The Alaska Native Subsistence Co-Management Demonstration Act of 2014<sup>94</sup> proposed a new co-management structure for the Ahtna region in Interior Alaska.<sup>95</sup> This proposal would amend ANILCA to provide for co-management on traditional lands within this specific region, integrating tribal governance and doing away with the dual system of management currently in place.<sup>96</sup> In his testimony in support of the bill, the President of Tanana Chiefs Conference stated,

The lack of authority to manage hunting and fishing on our own ANCSA lands is one of the greatest existing injustices for Alaska Natives. This [bill] would remedy this injustice . . . . Protection of Alaska Native hunting and fishing will continue

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90. CASE & VOLUCK, *supra* note 54, at 47.

91. *Id.*

92. Alaska Federation of Natives, *Alaska Native Priorities for the 2012-2013 Presidential & Congressional Transition: White Paper* (Anchorage, Alaska: Alaska Federation of Natives, [2012]), [http://www.nativefederation.org/wp-content/uploads/2012/10/AFN\\_TransitionWhitePaper\\_121912.pdf](http://www.nativefederation.org/wp-content/uploads/2012/10/AFN_TransitionWhitePaper_121912.pdf) (accessed October 28, 2013).

93. *Id.* at 4-5.

94. The Alaska Native Subsistence Co-Management Demonstration Act of 2014, H.R. Discussion Draft, 113th Cong. (2014) *available at* <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=371688> (last accessed Sept. 14, 2014).

95. *Id.*

96. *Id.*

to be the Alaska Native people's number one priority until we see implementation on the ground of legislation establishing an Alaska Native priority and Alaska Native co-management.<sup>97</sup>

Citing the failure of the state of Alaska and the federal government to protect subsistence resources, Dr. Rosita Worl urged Congress to adopt approaches more similar to the successful approaches adopted through the MMPA that authorizes co-management of subsistence resources in order to "ensur[e] the conservation of wildlife populations, and to ensure that Ahtna tribal members . . . continue their tribal hunting way of life."<sup>98</sup>

Shortly after the bill was introduced in the United States House of Representatives, the state of Alaska, through the Commissioner of Fish and Game, made it clear that the state did not support this effort. In a letter to Representative Don Young—the legislation's sponsor—Commissioner Cora Campbell wrote "[t]he Alaska Constitution is unambiguous in reserving to the people for common use fish, wildlife and waters, while at the same time mandating a sustained yield of those same resources."<sup>99</sup> However, the State's position fails to acknowledge that tribes can be viable, valuable partners in fish and game management.

## 2. *The Marine Mammal Protection Act: Tribes As Rights Holders*

Unlike ANILCA, the MMPA<sup>100</sup> specifies the rights of Alaska Natives, not rural Alaskans, to hunt marine mammals for subsistence. The MMPA vested management authority for marine mammals with the federal government and prohibits all taking of marine mammals, with few exceptions.<sup>101</sup> One of these exceptions allows Alaska Natives to continue to "take marine mammals in a non-wasteful manner for subsistence purposes or to create authentic native handicrafts or clothing."<sup>102</sup> In 1994, Congress amended the MMPA to authorize federal

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97. *Hearing on Wildlife Management Authority Within the State of Alaska under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act Before the Comm. on Energy & Natural Res.*, 113th Cong. (statement of Jerry Isaacs, President, Tanana Chiefs Conference) [hereinafter *Wildlife Management Hearing*].

98. *Wildlife Management Hearing*, *supra* note 97 (statement of Rosita Worl, President, Sealaska Corp.).

99. Craig Medred, *State Rejects Idea of Co-Management of Alaska Wildlife with Native Corporation*, ALASKA DISPATCH NEWS (April 3, 2014), <http://www.alaskadispatch.com/article/20140403/state-rejects-idea-co-management-alaska-wildlife-native-corporation>.

100. 16 U.S.C. §§ 1361–1432h (2012).

101. CASE & VOLUCK, *supra* note 54, at 287.

102. *Id.*

agencies to enter into cooperative agreements with Alaska Native organizations for marine mammal subsistence management.<sup>103</sup> These organizations include the Alaska Eskimo Whaling Commission, the Eskimo Walrus Commission, the Alaska Sea Otter and Steller Sea Lion Commission, and the Alaska Native Harbor Seal Commission.<sup>104</sup>

Importantly, the MMPA recognizes the rights of Alaska Natives to harvest marine mammals and affords a subsistence priority to tribal members. In turn, these rights and priorities guide management practices. The MMPA's provisions fostered unique co-management agreements rooted in and reflective of government-to-government relationships between Alaskan tribes and federal and state management agencies. Co-management agreements serve as a means to not only integrate local knowledge and needs into marine mammal management decisions, but as a way of ensuring more general ecosystem health, particularly in times of great environmental change.<sup>105</sup>

Throughout the United States, Indian tribes engage in natural resource governance to varying degrees.<sup>106</sup> In Alaska, the lack of a land base from which to assert jurisdiction over subsistence management prevents Alaskan tribes from exercising their rights as sovereigns to govern the resources upon which they depend. In the case of ANILCA, the failure to engage tribes in a sovereign partnership has left Alaskan tribes in a position where they need to seek changes to federal law in order to participate in subsistence management on a government-to-government basis.

## B. Environmental Quality Regulation and Management

Alaska tribes' lack of territoriality prevents their participation in the type of environmental regulatory authority available to other tribes in the continental United States.<sup>107</sup> While federal laws allow non-

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103. *Id.* at 289.

104. *Id.*

105. See, e.g., Martin D. Robards, et al., *Limitations of an Optimum Sustainable Population or Potential Biological Removal Approach for Conserving Marine Mammals: Pacific Walrus Case Study*, 91 J. OF ENVTL. MGMT. 57 (2009); C.D. Brower, et al., *The Polar Bear Management Agreement for the Southern Beaufort Sea: An Evaluation of the First Ten Years of a Unique Conservation Agreement*, 55 ARCTIC 362 (2002) (concluding that the agreement between Canadian First Nations and Alaskan tribes resulted in sustainable management practices and calling for increased monitoring and education to ensure continued success).

106. U.S. ENVTL. PROT. AGENCY ET AL., TRIBAL SUCCESSES: PROTECTING THE ENVIRONMENT AND NATURAL RESOURCES 1 (2007), available at <http://www.penobscotnation.org/epa/epa.pdf>.

107. 33 U.S.C. § 1377(e) (2012).

Alaskan Indian tribes to apply for treatment as a state when they seek to manage specific environmental programs under the federal Clean Water<sup>108</sup> and Clean Air Acts,<sup>109</sup> such applications are unavailable to Alaska tribes.<sup>110</sup> Under the Clean Water Act, for example, the Environmental Protection Agency (EPA) is authorized to “treat an Indian tribe as a State for [certain] purposes” if certain criteria are met.<sup>111</sup> Resources, for example, must be “held by an Indian tribe, held by the U.S. in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.”<sup>112</sup> Lands transferred under ANCSA do not qualify under this subsection. The ability of Alaskan tribes to avail themselves of the opportunity to manage water and air quality under United States law is, therefore, preempted.

Though excluded from explicit water and air management, however, Alaskan tribes may work with the EPA through the Indian Environmental General Assistance Program,<sup>113</sup> which authorizes funding through EPA to federally recognized tribes and tribal consortia to plan, develop, and establish environmental protection programs, including solid and hazardous waste programs.<sup>114</sup>

### C. Climate Change, Adaptation, and Resilience

Loss of territoriality also limits the ability of Alaskan tribes to respond to climate change because of the commensurate lack of

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108. 33 U.S.C. §§ 1251-1388 (2012).

109. 42 U.S.C. §§ 7401-7671q (2012).

110. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1989); 40 C.F.R. § 131.8 (2014).

111. 40 C.F.R. 131.8 (2014).

112. 33 U.S.C. § 1377(e)(2) (2012).

113. 42 U.S.C. § 4368b (2012).

114. *Id.* In 1984, the EPA became the first agency to adopt its own “Indian policy,” which defined how it would interact with tribes. WILLIAM D. RUCKELSHAUS, ENVTL. PROT. AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS, (1984), available at <http://epa.gov/tp/pdf/indian-policy-84.pdf>. While the policy describes how the EPA operates on Indian reservations, it was not directly relevant to most of Alaska (with the exception of the Metlakatla Indian reservation). Remedying this, subsequent EPA policy statements were more broadly articulated to include Alaska Native tribes. See ENVTL. PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES (2011), available at <http://www.epa.gov/tribalportal/pdf/cons-and-coord-with-indian-tribes-policy.pdf> (identifying Alaska tribes as among those to whom these policies applied).



regulatory authority.<sup>115</sup> Climate change has warmed Alaska more than twice as rapidly as the rest of the United States in the last sixty years.<sup>116</sup> The impacts of warmer temperatures include reduced sea ice, retreating glaciers, thawing permafrost, earlier snowmelts, and drier landscapes.<sup>117</sup> Temperatures, precipitation, and changes in snowmelt and permafrost are all expected to continue to increase, creating many changes in all aspects of life in America's Arctic.<sup>118</sup> Some of the more profound impacts of the rapidly changing climate include threats to community viability and infrastructure.<sup>119</sup> Disappearing sea ice causes Alaska's coastlines to erode, threatening communities living along the coast with displacement, and possibly forcing communities to relocate.<sup>120</sup> Thawing permafrost alters wildlife habitats, increasing the frequency of wildfires, and altering the availability of safe drinking water sources.<sup>121</sup>

Impacts to indigenous communities throughout the United States include loss of access to traditional foods, decreases in water quality and quantity, damage and loss to traditional lands, damages to community infrastructures, and the increasing threat of forcible relocation.<sup>122</sup> Furthermore, "without scientific monitoring, tribal decision makers lack the data needed to quantify and evaluate current conditions . . . and to plan and manage resources accordingly."<sup>123</sup>

At the same time, opening oceans and extended ice-and-snow-free seasons are creating unprecedented opportunities for economic development projects that require access to natural resources and the means to transport resources to market.<sup>124</sup> But with increases in these economic opportunities, communities must be prepared to address both the "perceived threats and anticipated benefits."<sup>125</sup> The climate and

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115. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530–31 (1998).

116. F.S. CHAPIN ET AL., *ALASKA, CLIMATE CHANGE IMPACTS IN THE UNITED STATES, THE THIRD NATIONAL CLIMATE ASSESSMENT* 516 (J. M. Melillo et al. eds., 2014), available at <http://nca2014.globalchange.gov/report/regions/alaska>.

117. *Id.*

118. *Id.*

119. ROBIN BRONEN & F.S. CHAPIN, *ADAPTIVE GOVERNANCE AND INSTITUTIONAL STRATEGIES FOR CLIMATE-INDUCED COMMUNITY RELOCATIONS IN ALASKA* 9322 (Robert W. Kates et al. eds., 2013).

120. *Id.* at 9321.

121. CHAPIN ET AL., *supra* note 116 at 520.

122. BULL BENNETT & NANCY MAYNARD, *INDIGENOUS PEOPLES, LAND AND RESOURCES, CLIMATE CHANGE IMPACTS IN THE UNITED STATES, THIRD NATIONAL CLIMATE ASSESSMENT* 298 (J.M. Melillo et al. eds., 2014), available at <http://nca2014.globalchange.gov/report/sectors/indigenous-peoples>.

123. *Id.* at 304.

124. *Climate Impacts in Alaska*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/climatechange/impacts-adaptation/alaska.html> (last modified Sept. 9, 2013).

125. CHAPIN ET AL., *supra* note 116, at 523.

economic changes that communities throughout Alaska face require institutional strength and “strength from within in order to face an uncertain future.”<sup>126</sup>

Just as global, national, and state governments and institutions evolve to adapt to the changing climate, tribes need governance tools to effectively respond to the needs of their communities. “To be effective and culturally appropriate, it is important that such institutional frameworks recognize the sovereignty of tribal governments and that any institutional development stems from significant engagement with tribal representatives.”<sup>127</sup>

#### D. Public Safety

Finally, lack of territoriality prevents tribal governments from protecting the safety of their members. Alaska ranks first in the United States for suicide and intimate partner homicides, and more than half of Alaskan women have been victims of sexual violence.<sup>128</sup> Only thirty-nine of the 220 rural communities have courthouses,<sup>129</sup> and most lack public safety personnel.<sup>130</sup> Seventy-five of the more than 220 villages have no law enforcement,<sup>131</sup> and only one community has a shelter for domestic violence victims.<sup>132</sup> For many, accessing law enforcement or a shelter requires an airplane ride, with all its associated costs.<sup>133</sup> Alaska Native women are especially vulnerable: while Alaska Native women are less than 20% of the state’s overall population, they represent nearly half of all reported rape victims.<sup>134</sup> Children are also susceptible to community violence, with the impacts falling disproportionately on Alaska Native children, who comprise more than half of all

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126. *Id.*

127. BENNETT & MAYNARD, *supra* note 122, at 307.

128. Council on Domestic Violence & Sexual Assault, *Intimate Partner Violence and Sexual Violence in the State of Alaska: Key Results from the 2010 Alaska Victimization Survey*, UAA JUSTICE CENTER (2010), [http://justice.uaa.alaska.edu/research/2010/1004.avs\\_2010/1004.07a.statewide\\_summary.pdf](http://justice.uaa.alaska.edu/research/2010/1004.avs_2010/1004.07a.statewide_summary.pdf) (last visited Oct. 3, 2014).

129. *See generally* ALASKA LEGAL SERVICES CORPORATION, 2012 ALASKA TRIBAL COURT DIRECTORY (2012), available at [www.alaskatribes.org/uploads/2012-tc-directory.pdf](http://www.alaskatribes.org/uploads/2012-tc-directory.pdf) (listing all communities and noting which have courthouses).

130. INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES ch. 3, at 67 (2013), available at [http://www.aisc.ucla.edu/iloc/report/files/Chapter\\_3\\_STJ.pdf](http://www.aisc.ucla.edu/iloc/report/files/Chapter_3_STJ.pdf).

131. *Id.* ch. 2, at 47, available at [http://www.aisc.ucla.edu/iloc/report/files/Chapter\\_2\\_Alaska.pdf](http://www.aisc.ucla.edu/iloc/report/files/Chapter_2_Alaska.pdf).

132. *Id.* at 41.

133. *See id.* (noting distances between women and these services).

134. *Id.*

maltreatment reports to Child Protective Services.<sup>135</sup>

Report after report chronicles these deficiencies. In late 2013, the United States Indian Law and Order Commission found that “the problems in Alaska are so severe . . . [they] are no longer just Alaska’s issues; they are national issues.”<sup>136</sup> In 2012, the United Nations Special Rapporteur on Indigenous Rights identified “continuing systemic barriers to the full realization of indigenous peoples’ rights.”<sup>137</sup> In 2007, Amnesty International described barriers that deny indigenous women access to justice and perpetuate intolerable levels of sexual and domestic violence in Alaska.<sup>138</sup>

The lack of territoriality has very specific legal consequences for the ability of Alaskan tribes to protect their communities and thus ensure their wellbeing. For example, the United States Congress reauthorized the Violence Against Women Act (VAWA)<sup>139</sup> for the third time on March 7, 2013.<sup>140</sup> VAWA included provisions specifically designed to expand tribal jurisdiction over domestic violence crimes.<sup>141</sup> However, VAWA specifically excluded Alaska Native tribes from this provision, not because they are not governments, but because of the perceived lack of Indian Country to support tribal jurisdiction.<sup>142</sup>

In November of 2013, the Indian Law and Order Commission (ILOC) issued a report entitled “A Roadmap for Making Native America Safer.”<sup>143</sup> Their findings regarding the lack of justice in Indian Country led to a recommendation to “reinforc[e] the power of locally based Tribal criminal justice systems” as part of a broader set of

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135. *Id.* at 43.

136. *Id.* at Executive Summary xii, available at [http://www.aisc.ucla.edu/iloc/report/files/Front\\_Material.pdf](http://www.aisc.ucla.edu/iloc/report/files/Front_Material.pdf).

137. U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in the United States of America*, U.N. Doc A/HRC/21/47/Add.1 (Aug. 30 2012), available at <http://jurist.org/documents/Anaya-Report-US-2012.pdf>.

138. AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), available at [www.amnestyusa.org/pdfs/MazeOfInjustice.pdf](http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf).

139. S. Res. 47, 113th Cong. (2013) (enacted).

140. *Id.*

141. 25 U.S.C. § 1304 (2012).

142. See Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54 § 910(a) (“In the State of Alaska, the amendments made by sections 904 and 905 [recognition of civil domestic violence jurisdiction over “any person”] shall only apply to the Indian country (as defined in section 1151 of title 18, United States Code) of the Metlakatla Indian Community, Annette Island Reserve.”).

143. INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER (2014), available at <http://www.aisc.ucla.edu/iloc/report/index.html>.

recommendations related to reinstating and recognizing Indian Country in Alaska.<sup>144</sup> Specifically, the Report called for:

- Amending ANCSA to provide for lands transferred under that Act to be included as Indian Country under federal law;<sup>145</sup>
- Clarifying and affirming that Native allotments and townsites are Indian country;<sup>146</sup>
- Amending ANCSA to allow regional corporations to transfer lands to tribal governments and provide that those lands can be put back into trust status, reinvigorating their status as trust lands and therefore capable of sustaining tribal governance.<sup>147</sup>

In the context of public safety, ILOC recommended reestablishing territorial sovereignty for Alaska Native tribal governments as a vital step to improve public safety in rural communities.<sup>148</sup> Land-based jurisdiction is critical, because even though the Alaska Supreme Court recognizes the “non-territorial sovereign authority”<sup>149</sup> of tribes to govern themselves, the extent of that authority remains an uncertain question. Moreover, the Governor’s office maintains the position that the lack of Indian Country creates an insurmountable obstacle to local control, and thus creates additional impediments for tribes seeking to protect their communities from violence.<sup>150</sup>

These four consequences impact the capacity of tribal governments to ensure that their communities have the tools necessary to survive and thrive in times of change. The next Part illustrates two distinct approaches that Alaskan tribes have taken to break through these obstacles: asserting their right to self-determination, and creating

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144. Troy A. Eid, Summary Presentation of *A Roadmap for Making Native America Safer*, INDIAN LAW AND ORDER COMMISSION (Nov. 2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer.pdf).

145. INDIAN LAW AND ORDER COMMISSION, *supra* note 143, at 51.

146. *Id.* at 52.

147. *Id.*

148. *Id.* at 51.

149. *Simmonds v. Parks*, 329 P.3d 995, 1008–09 (Alaska 2014).

150. In comments to the ILOC, the Alaska Attorney General took the position that the lack of Indian Country meant that tribes had jurisdiction in only two arenas: (1) the authority of tribes to determine tribal membership and (2) the authority to regulate disputes involving child protection and child custody when both parents and the child are members of the tribe. Letter from Michael Geraghty, Attorney General, Alaska, to Troy Eid, Chairman, ILOC (Feb. 1, 2013) (on file with author). The Attorney General argued that the lack of territoriality is fatal to tribal authority beyond these two areas, saying “land status is particularly important because tribal authority centers on the land held by the tribe and on tribal members within the reservation.” *Id.* Because no reservations other than Metlakatla exist in Alaska, there is no basis for tribal authority. The State continues to make this argument to object to the exercise of tribal authority in a judicial arena as well. *See e.g., Simmonds*, 329 P.3d at 1009–10.

capacity to control the fates and futures of their communities.

#### IV. INNOVATIONS IN LOCAL GOVERNANCE

Despite the obstacles the lack of territorial sovereignty presents, Alaska Native tribes continue to assert fate control and, in doing so, have found innovative ways to promote human development. This section describes two distinct approaches for achieving effective self-governance. First, due to a proposed change in federal regulation, Alaska Native tribes may soon be able to put land back into “Indian Country” status, thus extending their territorial reach. Second, Alaska Native tribes have taken advantage of science and traditional knowledge as a point of entry into an otherwise off-limits resource management regime. As this Article concludes, both approaches are necessary for tribal governments to exercise self-determination and build their capacity for fate control.

##### A. Increasing Indian Country: Taking Land Back Into Trust Status

Throughout the United States, Indian tribes are re-purchasing lands once lost during the federal allotment era, and putting those lands back into federal trust status.<sup>151</sup> For Alaska Native tribes, however, this option has been unavailable, until now.<sup>152</sup> In May of 2014, the Department of Interior issued a draft regulation allowing Alaskan lands to be returned to trust status, recasting them as “Indian country” capable of supporting tribal governance.<sup>153</sup>

In 1887, Congress passed the General Allotment Act,<sup>154</sup> otherwise known as the Dawes Severalty Act.<sup>155</sup> The Act deeded parcels of land within the borders of Indian reservations across the United States to individual Indians for agricultural and grazing purposes.<sup>156</sup> Much of the

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151. Larry Schumacher, *Solving a Land-Control Dilemma*, RURAL MINN. J. (2014), available at [http://www.ruralmn.org/rmj\\_winter2014/rmj2014q3-land-control-dilemma](http://www.ruralmn.org/rmj_winter2014/rmj2014q3-land-control-dilemma).

152. Teresa Hull & Linda Leask, *Dividing Alaska 1867-2000: Changing Land Ownership and Management*, 32 ALASKA R. SOC. & ECON. CONDITIONS 1, 6-9, (2000), available at <http://www.iser.uaa.alaska.edu/Publications/Landswebfiles/lands.pdf>.

153. News Release, United States Department of the Interior, Secretary Jewell Issues Secretarial Order Affirming American Indian Trust Responsibilities (Aug. 20, 2014), available at <http://www.bia.gov/cs/groups/public/documents/text/idc1-027607.pdf>.

154. 25 U.S.C. §§ 331-33 (1994), repealed by 114 Stat. 2007 (2000).

155. *Id.*

156. Lauren L. Fuller, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act Through a Comparison with the Dawes Act of 1887*, 4 AM.

land allotted under the Act was quickly lost, reservations were carved up, and the tribal land base fractured, making self-governance difficult if not impossible.<sup>157</sup> The amount of land held in trust for indigenous tribes fell from 138 million acres in 1887 to 52 million acres in 1934.<sup>158</sup>

During subsequent eras, policies of Indian self-determination replaced policies of assimilation, and federal law shifted its focus towards support for self-governance.<sup>159</sup> One example includes the Indian Reorganization Act of 1934.<sup>160</sup> The Indian Reorganization Act included a provision authorizing the Secretary of the Interior to convert private land back into Indian Country upon petition by a tribal member or tribal government.<sup>161</sup> In 1936, this provision was extended to include the then-territory of Alaska.<sup>162</sup>

After ANCSA passed in 1971, the Native Village of Venetie tribal government petitioned for the lands ceded to its village corporation to be returned back to Indian Country pursuant to the Indian Reorganization Act.<sup>163</sup> In response, an Associate Solicitor for Indian Affairs denied their request, finding that ANCSA intended to “permanently remove all Native lands in Alaska from trust status.”<sup>164</sup> Two years later, this “Alaska exception” was codified in a federal regulation, and tribes in Alaska lost the opportunity to petition the federal government to return lands to Indian Country.<sup>165</sup>

That position became the subject of litigation in 2007 when four tribes challenged the Alaska exception in *Akiachak Native Community v. Salazar*.<sup>166</sup> Six years later, the Federal District Court ruled in favor of the

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INDIAN L. REV. 269, 270 (1976).

157. Frank Pommersheim, *Land Into Trust: An Inquiry Into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521–23 (2012).

158. *Id.* at 522.

159. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 45–46 (2006).

160. Indian Reorganization Act of 1934 (Wheeler-Howard Act), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*).

161. *Id.* at ch. 576 § 17, 48 Stat. 988 (codified as amended at 25 U.S.C. § 477 (2012)).

162. Act of May 1, 1936, Pub. L. No. 74-538, 49 Stat. 1250 (codified at 25 U.S.C. § 473a). *See also* Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648-01, 24,649 (proposed May 1, 2014) (to be codified as 25 C.F.R. pt. 151) (explaining the history of the Alaska Exclusion).

163. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 24,649; *see also* Alaska v. Native Vill. of Venetie Tribal Gov’t, 522 U.S. 520, 524–33 (1998) (finding that the Native Village of Venetie was not considered Indian country after lands were transferred to private corporations and then subsequently conveyed back to the tribe).

164. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 24,649.

165. Land Acquisitions, 25 C.F.R. pt. 120a (1980).

166. 935 F. Supp. 2d 195, 201 (D.D.C. 2013), *appeal docketed*, No. 13-5361 (D.C.

tribes, removed the Alaska exception, and found that Congress did not explicitly prevent Alaskan tribes from petitioning to have lands put into trust.<sup>167</sup> Thus, by denying the tribes' petitions to return their land, the state violated the tribes' right to enjoy the privileges and immunities "available to all other federally recognized tribes by virtue of their status as Indian tribes."<sup>168</sup>

As of this writing, that decision is under appeal. In May of 2014, however, the Department of the Interior issued regulations to eliminate the Alaska exception.<sup>169</sup> In doing so, the Department of the Interior opened the door to petitions to place lands back into trust. In addition to determining that there was no legal basis upon which to issue the Alaska exception, the Department of the Interior justified its position as consistent with the policy of "honoring of principles of tribal self-reliance and self-governance."<sup>170</sup> Likewise, the Federal Register notice identifies other federal findings, such as one from the Indian Law and Order Commission report that emphasized the need to promote self-determination by expanding the land base available to tribal governance, as well as one stating that providing trust lands in Alaska would offer additional authority for tribes to partner with the State of Alaska to deal with issues of public safety and community resilience.<sup>171</sup>

While the lack of a land base has very real legal consequences for the ability of tribes to self-govern, it has attitudinal consequences as well. The state of Alaska litigates, for example, against tribes asserting self-governance and argues that the lack of territorial jurisdiction impedes the exercise of tribal jurisdiction in almost every circumstance.<sup>172</sup> Troy Eid, Chairman of the Indian Law and Order Commission, has stated that, according to his research, no state in the United States spends more money per capita litigating against its own citizens than Alaska, referring to the amount of money Alaska spent fighting the exercise of tribal jurisdiction.<sup>173</sup> Eid implored the state to avoid "treat[ing] Alaska Natives as stakeholders."<sup>174</sup> Turning to the audience during a speech, he said, "you are not stakeholders. You are

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Cir. Dec. 4, 2013).

167. *Id.* at 210-11.

168. *Id.*

169. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 24,649.

170. *Id.* at 24,651.

171. *Id.*

172. See, e.g., *Akiachak Native Cmty.*, 935 F. Supp. 2d at 201; *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 524-33 (1998).

173. TananaChiefsConference, 2014 TCC Keynote Speaker – Troy Eid, YouTube (March 25, 2014), <https://www.youtube.com/watch?v=w7ubqZsKi2c>.

174. *Id.*

members of sovereign governments.”<sup>175</sup>

## B. The Yukon River Intertribal Watershed Council: Innovations In Governance

Defined as “great river” in the Gwich’in language,<sup>176</sup> the Yukon River is the fourth largest watershed in the United States,<sup>177</sup> and the largest free flowing river in the world.<sup>178</sup> The river flows for 2,300 miles (3,700 kilometers) from its headwaters in Yukon Territory, Canada, through Alaska and out into the Bering Straits.<sup>179</sup> “With a little jigsawing, the drainage basin of the Yukon River could contain all of Texas and California, the largest of the contiguous states, or sixteen of the little ones.”<sup>180</sup>

Because of its size and location, the Yukon River watershed contains not only a diverse eco-system but also varied and complex governance regimes.<sup>181</sup> The complexities and confusion caused by legislation and litigation left no clear path for Alaska Native tribes to assert a right to self-govern water rights within the Yukon watershed. This Subpart examines the complex situation in the Yukon River watershed and the innovative ways in which the Alaska Native tribes are asserting their right to self-governance.

### 1. Diversity In The Yukon River Watershed

The Yukon River watershed is one of the most diverse ecosystems in North America and is vital to the ecosystems of the Bering and Chukchi Seas.<sup>182</sup> Its relatively undisturbed ecosystem has thousands of lakes, ponds, sloughs, wetlands, and river habitats.<sup>183</sup> The river basin is home to more than 150 bird species, 40 mammal species, and 18 species

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175. *Id.*

176. T. LOMAX ET AL., ALASKA MONITORING AND ASSESSMENT PROGRAM 2009 YUKON RIVER CONDITION SUMMARY 1 (2012), available at [http://dec.alaska.gov/water/wqsar/monitoring/documents/YukonReport\\_Final.pdf](http://dec.alaska.gov/water/wqsar/monitoring/documents/YukonReport_Final.pdf).

177. TIMOTHY BRABETS ET AL., ENVIRONMENTAL AND HYDROLOGIC OVERVIEW OF THE YUKON RIVER BASIN, ALASKA AND CANADA 1 (2000), available at [ak.water.usgs.gov/Publications/pdf.reps/wrir99.4204.pdf](http://ak.water.usgs.gov/Publications/pdf.reps/wrir99.4204.pdf).

178. LOMAX ET AL., *supra* note 176, at 3.

179. *About Us: It All Begins with the Yukon River*, YUKON RIVER PANEL, <http://yukonriverpanel.com/salmon/> (last visited Sept. 10, 2014).

180. DAN O’NEILL, A LAND GONE LONESOME: AN INLAND VOYAGE AMONG THE YUKON RIVER 12 (2006).

181. BRABETS ET AL., *supra* note 177, at 12–13.

182. *Id.*

183. LOMAX ET AL., *supra* note 176, at 4.



of fish.<sup>184</sup> The Yukon provides eight percent of the Arctic Ocean's fresh water supply and is one of the longest salmon runs in the world.<sup>185</sup>

But the changing climate is impacting the lands and waters within the basin. Warming temperatures result in an earlier and longer spring melt period, increased permafrost thawing, increased runoff, and erosion.<sup>186</sup> These changes impact water quality, potentially causing disease and a rise in contamination levels for both fish and water.<sup>187</sup> The extent of these changes, and the ability to adequately assess their impacts on local communities, is difficult to determine because of the lack of temporal and spatial data about the river's water quality.<sup>188</sup>

The Yukon watershed has long been home to over 126,000 people and approximately seventy Alaskan tribes and Canadian First Nations.<sup>189</sup> Within Alaska, the Yukon River communities include 62 individual tribes of the Cup'ik, Yup'ik, Koyukon, and Gwich'in Athabascan tribal nations.<sup>190</sup> Approximately 83 percent of the population living along the river is indigenous, and subsistence is a necessary way of life for these communities.<sup>191</sup> The river and surrounding lands provide over half of the food supply and all of the drinking water for the villages living within the watershed.<sup>192</sup> As most of these communities are inaccessible by road, the river also provides a critical transportation corridor.<sup>193</sup>

On the Alaska side of the Yukon watershed, lands are owned by three different entities. Over two-thirds of the land within the Alaskan Yukon watershed is federally owned and managed as some form of conservation unit, such as a national park or wild and scenic river, although the United States military also holds title to a small percentage of these lands.<sup>194</sup> The state of Alaska and Alaska Native corporations, both village and regional, also own lands within the watershed.<sup>195</sup>

As a result of the variety of landowners, natural resources

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184. *Id.*

185. Chinook, YUKON RIVER PANEL, <http://www.yukonriverpanel.com/salmon/about/yukon-river-salmon/chinook/> (last visited Sept. 10, 2014).

186. Lauren E. Hay & Gregory J. McCabe, *Hydrologic Effects of Climate Change in the Yukon River Basin*, 100 CLIMATIC CHANGE 509, 510 (2010).

187. Monique G. Dubé et al., *Accumulated State of the Yukon River Watershed: Part I Critical Review of Literature*, 9 INTEGRATED ENVTL. ASSESSMENT & MGMT. 426, 428 (2013).

188. *Id.* at 436.

189. BRABETS ET AL., *supra* note 177, at 1.

190. LOMAX ET AL., *supra* note 176, at 5.

191. *Id.*

192. Dubé et al., *supra* note 187, at 428; LOMAX ET AL., *supra* note 176, at 5.

193. BRABETS ET AL., *supra* note 177, at 1.

194. *Id.* at 12.

195. *Id.* at 13.

management in the basin is varied. For example, the Alaska Department of Fish and Game and the United States Fish and Wildlife Service are responsible for managing subsistence resources along the river.<sup>196</sup> The Alaska Department of Environmental Conservation and the United States Environmental Protection Agency are responsible for managing water quality.<sup>197</sup> A variety of federal agencies are responsible for managing habitat within the basin, along with the Alaska Department of Natural Resources.<sup>198</sup> In addition, many of the wildlife species along the river are subject to international treaties such as the Migratory Bird Treaty.<sup>199</sup>

The complex system of environmental management within the Yukon watershed subjects the communities to a variety of governance regimes. All of the Alaska Native communities have a tribal council, and a few also have cities organized under state law.<sup>200</sup> Most of the communities are located within the unorganized borough,<sup>201</sup> which means that the State of Alaska exercises regional governance powers.<sup>202</sup> There are two Alaska Native corporations within the region: Doyon Corporation, with its corollary non-profit organization, Tanana Chiefs Conference, and Calista Corporation, with its non-profit affiliate, the

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196. See LOMAX ET AL., *supra* note 176, at 4 (“Subsistence . . . fisheries are actively managed by the Alaska Department of Fish and Game . . .”); *Federal Subsistence Fisheries Management on the Yukon River*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/alaska/fisheries/fieldoffice/fairbanks/subsistence.htm> (last visited Oct. 4, 2014) (discussing the U.S. Fish & Wildlife Service’s management of fisheries in the Yukon River for subsistence use).

197. See LOMAX ET AL., *supra* note 176, at 1 (discussing the Alaska Department of Environmental Conservation and the United States Environmental Protection Agency’s collaboration in completing a water quality field study of the Yukon River).

198. See BRABETS ET AL., *supra* note 177, at 12–13 (discussing the Bureau of Land Management’s ownership of twenty-two percent of the Yukon River Basin); *Yukon Tanana Area Plan*, ALASKA DEP’T OF NATURAL RES., <http://dnr.alaska.gov/mlw/planning/areaplans/ytap/> (last visited Oct. 4, 2014) (discussing the Alaska Department of Natural Resources’s establishment of management guidelines for land including the basin).

199. Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Dec. 8, 1916, 39 Stat. 1702.

200. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218-02 (Aug. 11, 2009) (including list of Native Entities with the State of Alaska).

201. *Legislative Directive for Unorganized Borough Review*, ALASKA DEP’T OF COMMERCE, CMTY., AND ECON. DEV.: DIV. OF CMTY. AND REG’L AFFAIRS, [http://www.commerce.state.ak.us/dca/lbc/boroughstudy/study\\_materials.htm](http://www.commerce.state.ak.us/dca/lbc/boroughstudy/study_materials.htm) (last visited Sept. 10, 2014).

202. ALASKA COMMISSION ON RURAL GOVERNANCE AND EMPOWERMENT, FINAL REPORT TO THE GOVERNOR 26–27 (1999), available at [http://www.commerce.state.ak.us/dca/RGC/RGC\\_Final\\_6\\_99.pdf](http://www.commerce.state.ak.us/dca/RGC/RGC_Final_6_99.pdf).

Association of Village Council Presidents.<sup>203</sup> Each of the sixty villages has a for-profit corporation that own lands in and around their respective communities.<sup>204</sup> Despite the numerous different governments involved in the Watershed, or perhaps because of it, there remains a huge gap regarding water quality monitoring and regulation, as well as a corresponding lack of scientific data.<sup>205</sup>

2. *A Case Study in Fate Control: Water Rights Within The Yukon Watershed*

In December of 1997, representatives of more than thirty Alaskan tribes and Canadian First Nations met in the community of Galena.<sup>206</sup> Those gathered met out of a common concern for the future of the watershed and its people. The goal of the meeting was to “organize, address, discuss and plan for environmental stewardship of the Yukon River.”<sup>207</sup>

During the three-day summit, participants described growing concerns about threats to the river posed by human activity. People discussed the dangers posed by contaminants and pollutants left over from intense military activity during the Cold War, and described their concerns that these pollutants caused cancer related illnesses and death within their communities.<sup>208</sup> People also raised the issue of mining and its impacts on water quality, as well as other community-based pollutants.<sup>209</sup>

The Yukon River Inter-Tribal Watershed Council (the “Council”) formed as a result of the three-day meeting.<sup>210</sup> The attendees adopted a mission statement by consensus pledging to “initiate and continue the

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203. DOYON LIMITED, <http://www.doyon.com> (last visited Sept. 10, 2014); CALISTA CORPORATION, <http://www.clistacorp.com> (last visited Sept. 10, 2014).

204. ALASKA COMMISSION ON RURAL GOVERNANCE AND EMPOWERMENT, FINAL REPORT TO THE GOVERNOR 24, 27, 31 (1999), *available at* [http://www.commerce.state.ak.us/dca/RGC/RGC\\_Final\\_6\\_99.pdf](http://www.commerce.state.ak.us/dca/RGC/RGC_Final_6_99.pdf).

205. Oasis Environmental, *Dutch Harbor Water Quality and Impairment Analysis Final Report*, ALASKA DEP’T OF ENVTL. CONSERVATION 3-7 to -8 (June 27, 2006), [https://dec.alaska.gov/water/wnpspc/protection\\_restoration/Dutchliuliuk/documents/06DutchHarborImpairmentAnalysis.pdf](https://dec.alaska.gov/water/wnpspc/protection_restoration/Dutchliuliuk/documents/06DutchHarborImpairmentAnalysis.pdf).

206. YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL (YRITWC), YUKON RIVER INTER-TRIBAL WATERSHED PROTECTION SUMMIT DEC. 11-14, 1997, GALENA ALASKA, THE FIRST EVER MEETING DEVOTED TO TRIBAL CONCERNS ABOUT THE YUKON RIVER WATERSHED: HISTORICAL OVERVIEW, MEETING SUMMARY AND RELATED INFORMATION (YUKON RIVERS SUMMIT) 9 (1998) (on file with the author).

207. *Id.*

208. *Id.* at 12.

209. *Id.* at 13-18.

210. *Id.* at 18.

clean up and preservation of the Yukon River for the protection of our own and future generations of our Tribes/First Nations and for the continuation of our traditional Native way of life.”<sup>211</sup> The organization’s vision is simple: to be able to drink water directly from the Yukon River.<sup>212</sup> Since its formation, the Council has operated a variety of programs within the Watershed, all designed to promote local environmental governance and stewardship.<sup>213</sup>

One of the flagship programs is the Council’s Water Quality Monitoring Program. This program is the largest indigenous international monitoring network in the world, collecting data at over fifty sites along the River.<sup>214</sup> Jon Waterhouse, Executive Director of the Council, explained that although the Council did not set out to collect “scientific” data, the benefit of doing so quickly became clear: collecting water quality data has become a way for indigenous people to express their concerns to western scientists and land managers.<sup>215</sup>

In addition to the knowledge gained through this program, the Council has been instrumental in building environmental governance capacity among its member tribes. By 2013, sixteen years after the creation of Council, over forty of the fifty-five Alaskan member tribes operated at least one environmental program, including solid waste disposal, backhauling, and water quality monitoring programs.<sup>216</sup>

### 3. *Reclaiming Self-Governance Through Science*

Despite possessing water quality information along the Yukon River, the Council and its member tribes lack the authority to use it. In 2011, the Council initiated a project to reassert authority over water quality, the motivation for which was described by Council Executive Director John Waterhouse:

As we set out water quality standards and define what we expect clean water to be, we will then be able to apply that on

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211. *YRITWC Mission*, YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, <http://www.yritwc.org/> (last visited September 11, 2014).

212. *About Us*, YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, <http://www.yritwc.org/About-Us/About-Us.aspx> (last visited Oct. 11, 2014).

213. *Strategic Plan*, YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, <http://www.yritwc.org/About-Us/Strategic-Plan.aspx> (last visited Oct. 11, 2014).

214. Interview with Ryan Toohey, Sci. Dir., Yukon River Inter-Tribal Watershed Council, in Anchorage, Alaska (Sept. 6, 2013).

215. Interview with Jon Waterhouse, Exec. Dir., Yukon River Inter-Tribal Watershed Council, in Anchorage, Alaska (Feb. 28, 2013).

216. Various telephone interviews conducted by Author with each member community.

the river. We are making our own decisions about our own lives rather than having someone else have that control. This governance project is a way of regaining the ground lost in ANCSA. It is a way of describing to the government that this water is part of us, it is our connection to the planet. If you can't make the decisions for yourself and apply them, you are not sovereign and not self-determining. The [governance] project puts us in the decision making seat.<sup>217</sup>

During the 2011 summit, Council leadership adopted a resolution calling for the development of a "strategy to assert and implement indigenous water rights."<sup>218</sup> As part of this effort, the Council drafted basin-wide water quality standards based on both indigenous knowledge and scientific data.<sup>219</sup> The goal of this proposed plan is twofold: first, to improve water quality throughout the watershed and, second, to support the ability of indigenous governments impacted by the river's water quality to participate in the decision-making process.<sup>220</sup>

#### 4. Governance Through Innovation

Alaskan tribes living along the Yukon River do not have the statutory authority to co-manage the resources within the watershed. The lack of an Alaska Native preference precludes the participation of tribal governments in the subsistence regulatory process. The lack of Indian Country means tribes cannot apply for "Treatment as State" status under Environmental Protection Agency rules. And the failure of Alaska to engage with tribes as sovereigns cripples the abilities of these governments to act to protect water quality.

Overcoming these obstacles requires an innovative legal approach to leverage tribal water rights. As a result of the Ninth Circuit's decision in *Katie John v. United States*, the federal government has management authority over much of the land in the watershed.<sup>221</sup> Combined with the

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217. Interview with Jon Waterhouse, Exec. Dir. of the Yukon River Inter-Tribal Watershed Council, in Anchorage Alaska (Feb. 28, 2013).

218. YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, WATER RIGHTS RESOLUTION (2011) [hereinafter Council Resolution] (unpublished resolution) (on file with author).

219. *Id.*

220. See generally YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, WATER QUALITY PLAN (2013) (unpublished document) (on file with author).

221. *Katie John v. U.S.* (Katie John I), 247 F.3d 1032 (9th Cir. 2001). In *Katie John I* several Alaska Natives and the Village Council of Mentasta sued the U.S. in 1994 claiming that the Fish and Wildlife Service was not managing navigable waters as public lands and therefore not conforming to the subsistence protections afforded to public lands under ANILCA. As a result of that

co-management provisions contained within Section 809 of ANILCA, this could be the foundation for a governance regime that shares management authority between tribes and federal agencies.

In addition, the fact that the tribes and Council are in possession of the majority of scientific data about water quality within the Yukon watershed puts the tribes in a unique position: they possess the science, and thus should have a seat at the table.<sup>222</sup> The approach taken by the Council is unique in that it forges a pathway to self and shared governance through knowledge and science instead of relying on a specific statutory right to governance. The tribes, through the Council, have developed an innovative approach to compensate for these obstacles by building institutions and knowledge to support their capacity to become critical governance partners.

Even if tribes living along the Yukon were able to put land back into trust status as a result of *Akiachak*,<sup>223</sup> that alone would not solve the issue of tribal management of lands and resources within the watershed. Because of the checkerboard land ownership patterns within the Yukon watershed, and the overlapping complicated layers of federal, state and tribal governance, no single land-owner or sovereign can function in ignorance of the others. Rather, all three sovereigns must come together in a cooperative manner to share governance in order to ensure that the Yukon River watershed's resources are managed for the benefit of the watershed's people and wildlife.

The Council's governance strategy relies on their possession of most of the scientific and traditional knowledge about the river as a way

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litigation, United States courts directed the Secretary of the Interior to manage navigable waters within federal conservation units in accordance with the legal doctrine of "federal reserved water rights." *John v. United States (Katie John II)*, 720 F.3d 2014, 1221 (9th Cir. 2013). This doctrine means that "reserved waters" are to be managed for the same purposes as the adjacent lands: (1) to promote a rural subsistence priority; (2) to protect fish and wildlife; (3) to protect and improve the river's water quality (for functioning habitat for fish and wildlife); and (4) to honor and implement international agreements (such as the Pacific Salmon Treaty commitments within the Yukon River). *See id.* at 1229-30 (discussing the federal reserved water rights doctrine which allows the United States to reserve waters appurtenant to federally reserved lands to fulfill the purposes of that reservation, which may include the protection of fish and wildlife). Although this gave the United States Fish and Wildlife Service management authority over river stretches within and adjacent to federal lands within the Yukon River Basin, the case did not recognize the rights of Alaska Native tribes to manage these waters. *See id.* at 1243 ("We need not decide whether Alaska Native allotments can give rise to federal reserved water rights.").

222. Interview with Jon Waterhouse, Exec. Dir. of the Yukon River Inter-Tribal Watershed Council, in Anchorage Alaska (Feb. 28, 2013).

223. *See supra* Part IV.A.

to wedge open the door to shared management. It is early in this process, and too soon to know how successful this effort will be, but clearly the tribes have assumed the responsibility of carving a role for themselves in water governance.

## CONCLUSION

The consequences and responses of the loss of territoriality to the capacity of Alaskan tribes to govern are multi-dimensional. Tribes continue to fight for the right to self-govern and the capacity to control their own fates and futures in a variety of ways. This Article has described two such arenas: the federal regulatory framework that would allow the expansion of “Indian Country” to support territoriality, and an approach that relies on science and traditional knowledge as a pathway into governance.

As this Article describes, the return of land to Indian Country alone cannot cure the problems stemming from the initial loss of territoriality. Public policies designed to address issues of wellbeing must respond to the very real ways that the loss of lands have impacted the communities as described here. Appropriate policy responses should rely on both reinstating the land base from which tribes can assert sovereign authority, and adopting innovations in governance to integrate tribal governments as sovereign partners.

As a matter of domestic law, Alaska courts recognize that tribes have “non-territorial authority” over tribal members and may retain some amount of territorial authority.<sup>224</sup> As a matter of policy, adaptive governance frameworks offer institutional ideas about integrating local communities into resource decisions. As a matter of right, international human rights and human development theories recognize that tribes have a right to engage in self-government and self-determination.<sup>225</sup>

While the Alaska Constitution’s text endorses local governance,<sup>226</sup> its practices do not. For Alaska’s practices to accord with its principles, state support must be accorded to rural governments, including tribal governments, to the same degree as in urban communities. Such support

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224. Heather Kendall-Miller, *State of Alaska v. Native Village of Tanana: Enhancing Tribal Power by Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside and Outside of Indian Country*, 28 ALASKA L. REV. 217, 219 (2011).

225. *Self Determination (International Law)*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/self\\_determination\\_international\\_law](http://www.law.cornell.edu/wex/self_determination_international_law) (last visited Sept. 11, 2014).

226. See ALASKA CONST. art. X, § 1 (“The purpose of this article is to provide for maximum local self-government . . .”).

would enhance the capacity of tribal governments to adopt policies that promote human development and fate control.

Taken together, these points illustrate the connections between land, governance, and wellbeing. Understanding these connections is necessary for the creation of public policies that properly support tribal communities. Land is vital to governance, but governance must move beyond territoriality as a defining aspect of capacity. Governance frameworks that integrate multiple layers of governments, local, statewide, regional, and international, will be vital to ensuring the adoption of public policies that respond to the extraordinary changes local communities throughout Alaska's Arctic will face in the future. These frameworks, however, must integrate tribes as governments, not mere stakeholders, to ensure that tribes have the right to engage in self-determination and the capacity to guide the fates and futures of their communities.